IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1062 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAGANBHAI NURKABHAI AD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1062 of 1994

MS BANNA S DUTTA for Petitioner No. 1

Mr. K.P. Rawal, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 28/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Appellant, original accused, in this appeal filed under Section 374 of the Code of Criminal Procedure ('Code' for short), has challenged his conviction under Section 302 of the Indian Penal Code ('IPC' for short) and sentence imposed on him to undergo R.I. for life and fine of Rs.1000 in default R.I. for one month, recorded by the learned Additional Sessions Judge, Panchmahals, at Dahod, in Sessions Case No.68 of 1994, by judgment and order dated October 21, 1994.

2. Briefly stated, the prosecution case is as under: Deceased Mansukh Narkabhai was the brother of the appellant. Both the brothers owned agricultural land at village Kharod, Taluka Dahod. There was a dispute with regard to ancestral agricultural land and both the brothers claimed to be owners of the said land. On the day of the incident, i.e. on March 3, 1994, about 10 p.m. when the deceased was at his house, the appellant came to the house of the deceased and had picked up a quarrel with him. In the said quarrel, there was heated exchange of words between them about partition of the agricultural land. The appellant, who was carrying an axe with him, had given a blow on the back side of the head of the deceased and thereafter he had inflicted another axe blow on the parietal region of the head of the deceased. Due to infliction of two successive blows with axe, the deceased had fallen down. P.W.3, Mathuriben, wife of the deceased, who was present in her house, had raised shouts as a result of which P.W.4, Ratnabhai Kacharabhai, had rushed to the scene of offence. P.W.3, Mathuriben, had narrated the incident to P.W.4, Ratnabhai Kacharabhai. P.W.4, Ratnabhai, with the help of other persons, had taken the deceased to Dahod Cottage Hospital in a tractor. Before reaching Dahod Cottage Hospital, P.W.3, Mathuriben, had lodged First Information Report at Dahod Rural Police Station against the appellant, which came to be registered at CR No.I-34 of 1994 of Dahod Rural Police Station. The appellant had also sustained injuries in the said incident and had taken treatment at Dahod Cottage Hospital. The appellant also filed First Information Report against the deceased and P.W.3, Mathuriben, at Dahod Rural Police Station against the appellant, which came to be registered as N.C.Case No.48 of 1994 of Dahod Rural Police Station. The Doctor on duty at Dahod Cottage Hospital had examined the deceased and thereafter had advised the deceased to be taken to the Civil Hospital, at Vadodara.

Accordingly, the deceased was taken by a railway passenger train to SSG Hospital, Vadodara. During the treatment at SSG Hospital, Vadodara, the deceased had succumbed to the injuries on March 3, 1994 around 1.10 p.m. Yadi was sent to Raopura Police Station about the death of the deceased at SSG Hospital, Vadodara, which was entered as Raopura Police Station Diary Entry No.4/94. P.W.1, PSI, D.R. Dhamal, had gone to SSG Hospital, Vadodara, and had held inquest of the dead body of the deceased. After holding the inquest, the dead body was sent for autopsy. P.W.2, Dr. Pankaj Baria, Forensic Science Department, SSG Hospital, Vadodara, had performed autopsy of the dead body of the deceased. P.W.9, Senior PSI, Y.R.Pathan, of Dahod Rural Police Station, was entrusted with the investigation of CR No.I-34 of 1994 lodged against the appellant for causing murder of the deceased. Incriminating articles collected from the scene of offence during the course of investigation were sent to the Forensic Science Laboratory ('FSL' for short) for analysis. On completion of the investigation, and on receipt of the report of the FSL, and also after collecting injury certificates as well as post-mortem notes, chargesheet for the offence under Sections 302 and 504 of the Indian Penal Code and under Section 135 of the Bombay Police Act, came to be filed by Senior PSI, Mr. Pathan, in the Court of the learned Judicial Magistrate, First Class, Dahod, which was registered as Criminal Case No.978 of 1994. As the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, committed the case to the Court of Sessions, Panchmahals, at Godhra, where it came to be numbered as Sessions Case No.68 of 1994.

3. Charge Exh.2 was framed against the appellant for the offences punishable under Sections 302 and 504 read with Section 135 of the Bombay Police Act. The charge was read over and explained to the appellant wherein he pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellant, examined:

(1) P.W.1. PSI, Devshanker Rajabhai Dhamal of Raopura Police Station, Exh.18

(2) PW 2. Dr. Pankaj Haridas Barai, of SSG Hospital, Exh.19 ;

(3) PW 3. eye-witness, Mathuriben Harvibhai Damor Exh.24;

(4) PW 4. Ratnabhai Kacharabhai Exh.28 ;

(5) PW 5. Narsinh Vesta Exh.29 ;

(6) PW 6. PSO, Induben Kishorsinh of Dahod police

Station Exh.30 ;
(7) PW 7. Dr. Rajendrakumar K. Srivastav of Dahod Cottage Hospital, Exh.32 ;
(8) PW 8. Police Jamadar, Valsinhbhai Sadiyabhai of Dahod Rural Police Station, Exh.35 ; and
(9) PW 9. Mr. Y.R. Pathan, Senior Inspector, of Dahod Rural Police Station, Exh.37.
The prosecution also produced documentary evidence such as panchanama of scene of offence, inquest panchanama, post-mortem notes, First Information Report lodged by P.W.3, Mathuriben, panchanama of recovery of clothes of the deceased, discovery panchanama of axe, revenue records of land held in the names of the deceased and the appellant, report of the FSL, map of scene of offence, injury certificate of the deceased as well as injury certificate of the appellant, First Information Report lodged by the appellant against the deceased and P.W.3, Mathuriben, and the report of the FSL, to prove the charge against the appellant.

4. After the evidence of the prosecution was over, the appellant was questioned generally and his statement came to be recorded under Section 313 of the Code. The defence of the appellant was of general denial.

5. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the appellant, held that deceased had died homicidal death. The learned Additional Sessions Judge, further, held that the appellant had inflicted fatal blows with axe on the vital parts of the body of the deceased, which were sufficient in the ordinary course of nature to cause his death. On the basis of the abovereferred to conclusion, the learned Additional Sessions Judge, by impugned judgment and order, convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to undergo R.I. for life and fine of Rs.1000 in default R.I. for one month, which has given rise to filing of the present appeal by the appellants.

6. Learned counsel Ms. Banna S. Dutta, appearing for the appellant and learned APP, Mr. K.P. Rawal, have taken us through the entire record and proceedings of the Sessions Case. We have scanned through the entire evidence and reappreciated the oral as well as documentary evidence.

7. It is not in dispute that the deceased died homicidal death. The evidence of P.W.2, Dr. Pankaj

Haridas Barai, supported by the post-mortem notes Exh.20, proved beyond doubt that the blows inflicted on the vital part of the body and the injuries noted in the post-mortem notes, i.e. head of the deceased were sufficient in the ordinary course of nature to cause his death. The finding of the learned Additional Sessions Judge that the deceased died homicidal death, therefore, deserves to be confirmed.

8. The learned counsel for the appellant has contended that there was a dispute with regard to partition of the ancestral agricultural land as the said land stood in the joint names of the appellant and the deceased, and the deceased wanted to grab the entire land and, therefore, the appellant, being elder brother of the deceased, had gone to scold the deceased in the night of March 3, 1994. The First Information Report produced on the record of the case at Exh.31 shows that there was a heated exchange of words between the deceased and the appellant as a result the deceased had inflicted blows with stick on the head of the appellant whereas the wife of the appellant, namely, P.W.3, Mathuriben, had given him kick and fist blows. The appellant's First Information Report was registered as N.C. case No.48 of 1994 of Dahod Rural Police Station for the offences punishable under Sections 323, 504 and 114 of the Indian Penal Code. This First Information Report, in our view, had established the presence of the appellant at the time of commission of offence. As per the evidence of P.W.3, Mathuriben, due to the dispute with regard to partition of agricultural lands, there was a heated exchange of words between the deceased and the appellant and the appellant had become outrageous and had given two successive blows with axe on the back and on the parietal region of the head of the deceased. The evidence of P.W.3, Mathuriben, in our view, is reliable and trustworthy, and no doubt can be raised about her presence at the scene of offence. The evidence of P.W.3, Mathuriben, had withstood the searching cross examination and her evidence was not dislodged during cross examination.

9. The sequence, as narrated above, shows that there was a dispute since long with regard to division of agricultural land between the deceased and the appellant, and, because of that reason, a quarrel had taken place between them in the night of March 3, 1994. The presence of the appellant at the place of the incident is established from the First Information Report Exh.31 lodged by him against the deceased and P.W.3, Mathuriben. Even the appellant himself had gone for treatment to

Dahod Cottage Hospital on March 4, 1994 for the injuries sustained by him in the same incident and the injury certificate of the appellant was produced at Exh.34. As per the said certificate, the appellant sustained following injuries:

(1) CLW Rt parietal 2" x 1/4"x skin

(2) CLW Lt elbow 1" x 1/4"x skin

(3) CLW Rt great toe 1/2" x 1/4" x skin

The above evidence had proved that the appellant was present at the time of the incident. After the appellant was inflicted with stick blow by the deceased, out of provocation, he had, just to save his life, had inflicted successive blows with axe on the head of the deceased. As per the injury certificate Exh.33, of Dahod Cottage Hospital, the deceased had sustained following external injuries:

(1) Incised wound over right para occipital region 4" x 1" bone end brain cavity deep moderately brain meningces are seen. Compound fracture skull plus left incised wound and right glutal 2" x 1/2" x 3" long muscle deep.

(2) Incised wound over right quiteal 2" x 2" x muscle deep.

In the opinion of the Medical Officer of Dahod Cottage Hospital, those injuries were possible by sharp cutting instrument like axe and the said injuries were sufficient in the ordinary course of nature to cause death of the deceased. The above injuries also get support from the post-mortem notes Exh.20. P.W.2, Dr. Pankaj Haridas Barai, who had performed post-mortem of the body of the deceased, also deposed that the injuries sustained by the deceased on the occipital and parietal region of the head were sufficient in the ordinary course of nature to cause death of the deceased.

10. As mentioned earlier, looking to the manner in which the incident had taken place, the appellant, in our opinion, had, in exercise of his right of self defence, inflicted blows with axe on the head of the deceased, but, looking to the successive blows given by the appellant on the head of the deceased, he had certainly exceeded his right of self-defence. In our opinion, in the facts and circumstances of the case and the manner in which the incident had taken place as a result of which the deceased had lost his life, the offence, which the appellant committed, would fall under Section 304 Part 1 of the IPC, and not under Section 302 of the IPC, as recorded by the learned Additional Sessions Judge. Therefore, the conviction recorded and the sentence

imposed by the learned Additional Sessions Judge by the impugned judgment and order are required to be modified suitably.

11. As a result of foregoing reasons, the appeal is partly allowed. The conviction of the appellant under Section 302 of the Indian Penal Code and sentence imposed on him to undergo R.I. for life and fine of Rs.1000 in default R.I. for one month, recorded by the learned Additional Sessions Judge, Panchmahals, at Dahod, in Sessions Case No.68 of 1994, by judgment and order dated October 21, 1994, are quashed and set aside. Instead, the appellant is convicted under Section 304, Part 1, of the Indian Penal Code and sentenced to undergo R.I. for ten years and fine of Rs.500 in default R.I. for one month. The muddamal be destroyed in terms of directions given in the impugned judgment and order.

(M.H. Kadri, J.)

(M.C. Patel, J.)

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